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Legislative Notice

Editor, Judy Gorman Prinkey

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S. 543 – Volunteer Protection Act of 1997

Calendar No. 38

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NOTEWORTHY

- It has been announced that there will be an attempt today to proceed to S. 543, and an objection is anticipated. A cloture petition will then be filed. The Senate will debate the motion to proceed on Monday, and a cloture vote will occur on Tuesday at 2:15 p.m. If cloture is invoked, a vote on the motion to proceed will follow shortly.
- S. 543 helps taxpayers, volunteers, and recipients of social services by reforming certain liability laws to protect volunteers, nonprofit organizations, and governments from lawsuits that are based on the simple negligence of volunteers. The bill is based on congressional findings that persons are being deterred from volunteering because of concerns about liability risks, and this reduction in the number of volunteers is hurting nonprofit organizations and governments and the persons they serve.
- President Clinton proclaimed the week of April 13 as National Service and Volunteer Week. On April 27 through 29, the President will convene a Summit on Service at Independence Hall in Philadelphia. President Bush, General Colin Powell, and other prominent Americans will attend the summit. President Bush was a strong advocate of volunteerism through his "Thousand Points of Light" awards.
- On April 23 of this year, the House Judiciary Committee held a hearing on two House bills that would provide protection to volunteers, H.R. 911 and H.R. 1167 (neither bill is identical to S. 543). Senators Coverdell, McConnell, Ashcroft, and Santorum testified in support of protecting volunteers, as did Speaker Gingrich and many others.
- In 1990, the House adopted by voice vote an amendment that provided incentives for states to limit the liability of charitable organizations and volunteers. That amendment did not survive the conference, however. On February 28, 1990, the Senate had tabled a related amendment by a vote of 65-to-32 (Vote No. 20). (Other pertinent Senate votes include Vote No. 229 of July 30, 1993, and Vote No. 77 of April 18, 1996.)

BILL PROVISIONS

[This part of this Legislative Notice draws heavily on a section-by-section summary of the bill that was prepared by the office of Senator Coverdell.]

Section 1. Short Title.

Section 2. Findings and Purpose.

Section 3. Preemption and Election of State Nonapplicability.

With two exceptions, the bill generally preempts any State law that is inconsistent with it. First, the bill does not preempt any State law that provides additional protections for volunteers, nonprofit organizations, and government entities, *i.e.*, a State may set a higher standard than the bill requires. Second, the bill permits a State to opt out of the bill's requirements in any civil action that involves only citizens of that State. This provision allows a State to apply its own law exclusively in any case that does not involve out-of-State parties. (Section 4(d) of the bill lists some State laws that are not to be construed as inconsistent with the Act.)

Section 4. Limitation on Liability for Volunteers.

S. 543 provides that a volunteer of a nonprofit organization or government generally will be relieved of liability for harm if the volunteer was acting within the scope of his responsibilities and if he was properly licensed, certified, or authorized for the activities (whenever such licensing, certification, or authorization is appropriate or required). The volunteer is not shielded from liability for any harm that is caused by his willful or criminal misconduct, gross negligence, reckless misconduct, or his conscious, flagrant indifference to the rights or safety of the individual who was harmed. (The bill provides separately that none of its limitations on liability applies to misconduct that constitutes a crime of violence, an act of international terrorism or a hate crime, or to any misconduct that involves a sexual offense, the violation of any State or Federal civil rights law, or intoxication or drug use.)

Section 4(c) specifies that the bill does not affect the liability of any nonprofit organization or government entity for harm caused by a volunteer. In short, in the cases covered by the bill, an injured party may not be able to sue a volunteer but will be able to sue the entity that used the volunteer. Section 4(b) makes it clear that the bill will not affect the right of the nonprofit organization or government to bring suit against its own volunteers.

As noted above, S. 543 preempts State laws that are inconsistent with it. Section 4(d) specifies that the following types of State laws are not inconsistent with the Act: First, any State law requiring a nonprofit organization or governmental entity to use risk management or mandatory training procedures. Second, any State law making an organization liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees. Third, any State law making a liability limit inapplicable if the volunteer was

operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or vehicle owner to possess an operator's license or to maintain insurance. Fourth, any State law making a liability limit inapplicable if the civil action is brought by an officer of a State or local government pursuant to State or local law. And fifth, any State law making a liability limit applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity.

Section 4(e) limits punitive damages that may be awarded against volunteers, nonprofit organizations, or governmental entities. When the harm is caused by a volunteer acting within the scope of his responsibilities, punitive damages may be awarded only when the claimant demonstrates by clear and convincing evidence that the volunteer caused the harm through willful or criminal misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed. This provision is designed to make punitive damages (which are intended to punish the defendant and not to compensate the plaintiff) available only where a volunteer has acted egregiously.

Section 5. Liability for Noneconomic Loss.

Section 5 contains a reform of the rules of joint and several liability.

For any civil action against a volunteer, nonprofit organization, or government that is based on the act of a volunteer acting within the scope of his responsibilities, the liability of the volunteer, organization, or government for *noneconomic losses* will be proportional to each defendant's individual responsibility for the harm. Noneconomic losses includes losses for pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, loss of society and companionship, and all other nonpecuniary losses. For *economic losses* (which include medical expenses, lost earnings, the cost of replacement services, out-of-pocket expenses, etc.), each defendant will continue to be jointly and severally liable. This reform helps ensure that an injured party will receive full compensation for economic losses while protecting volunteers, nonprofit organizations, and governments from the costs of noneconomic harms that they did not cause.

Section 6. Definitions.

The key terms "economic loss," "harm," "noneconomic losses," "nonprofit organization," and "volunteer" are defined.

Section 7. Effective Date.

The bill takes effect 90 days after enactment and will apply to claims filed on or after the effective date.

BACKGROUND

The Need for This Legislation

[The following outline of liability reform and its history is taken from the introduction to Charles Robert Tremper's article, "Compensation for Harm from Charitable Activity," 76 Cornell Law Review 401 (1991); footnotes are omitted.]

"On a wintry evening, Carlyle and Perry walk along a city sidewalk near the Mercy Shelter for the Homeless, where Sam, a Shelter volunteer, has just finished pouring sand on the slippery sidewalk. Carlyle opens the door to the shelter and enters for the night. As Perry adjusts his stride to avoid the open door, he falls on the ice, spraining his back and tearing his coat. Perry's subsequent lawsuit will allege that Sam (the volunteer) negligently failed to cover the patch of ice with sand. The suit will seek general and special damages against Sam in his individual capacity and Mercy Shelter on the theory of respondeat superior. Shall Sam and Mercy Shelter be compelled to pay full tort damages to Perry? If so, what will happen to Carlyle and the other beneficiaries of the shelter?

"For many years the doctrine of charitable immunity would have foreclosed suit, but almost all states have either abandoned or substantially constricted the doctrine. Limitations on the liability of volunteers exist in some states, although these laws may offer little real protection. Thus, Mercy [Shelter] and Sam may be obligated to compensate Perry completely for his injuries. As a result, Mercy may not be able to assist Carlyle or otherwise pursue its primary charitable mission. Sam and others like him may be less inclined to volunteer in the future.

"Most states abrogated charitable immunity by imposing full liability for damages without adequate consideration of whether the unique characteristic of charitable organizations and volunteers warrant some other arrangement. For many years after the abolition of charitable immunity, the infrequency of suits against charitable actors and the availability of inexpensive liability insurance minimized the impact of the new rules. Not until the mid-1980s, when the price of liability insurance soared as coverage diminished and a few suits against charitable organizations and volunteers attracted substantial media attention, did the issue arouse much interest.

"Although the amount charitable organizations pay for liability insurance is certainly a cause for concern, the proper nature of that concern is easily misunderstood. If one were interested only in reducing charitable organizations' costs, such measures as rent control and lower gasoline taxes would have a greater impact. What gives the debate about tort rules for charitable actors extra significance is its role in defining the relationship between charitable organizations and the community they serve. * * * "

Examples of the Kinds of Lawsuits S. 543 Is Intended to Address

[The examples below were compiled by the American Tort Reform Assn. and put into the Congressional Record by Sen. McConnell on Nov. 29, 1995, p. S 17778.]

"In October 1983, Craig Fredborg celebrated his birthday by climbing Box Springs Mountain, overlooking Riverside, California. To his companions' horror, Fredborg slipped on a boulder and plummeted some 90 feet, sustaining severe spinal injuries.

"Alerted that Fredborg lay helpless on the slope, Walter Walker, now 54, and his son Kevin, 31, and teammates from the volunteer Riverside Mountain Rescue Unit scrambled to aid a physician and a paramedic in mounting a ticklish nighttime helicopter evacuation. Over the last 30 years, the unit's volunteers have saved hundreds of lives. But for their troubles, the Walkers and the others involved in the emergency mission were sued two years later by the victim, who asked \$12 million in damages, claiming that 'reckless and negligent' rescue techniques had caused him to become a quadriplegic.

"The lawsuit eventually was dropped. But not before the Walkers lost a lot of hours from their family printing business giving depositions and meeting with defense attorneys provided them by the county sheriff's department. Perhaps the most significant consequence of the suit, says Walker, is that meticulous documentation and planning procedures have been instituted in its wake to forestall future liability claims. 'Probably we were a little weak in that,' he concedes. Nevertheless, he adds, 'It definitely has slowed us down in getting the team into the field Concern about liability exposure has complicated how we look at every mission.' [Source: David O. Weber, "Thousand Points of Fright?" in *Insurance Review*, Feb. 1991]

"A man who was high on LSD was rescued by a student, after he had jumped from a 30-foot dockside bar into a seven-foot pool of water. The man suffered a broken neck and was left paralyzed for life. However, he subsequently sued both the school and the student. The judge eventually threw the case out, but unfortunately, this is just another prime example of a waste of taxpayers' money. [Source: *Mississippi Press*, May 2, 1993]

"Amateur referees at softball diamonds, high school stadiums, and college field houses are finding that their decisions can trigger major-league lawsuits. * * * A New Jersey umpire was sued by a catcher who was hit in the eye by a softball while playing without a mask; he complained that the umpire should have lent him his. The catcher walked away with a \$24,000 settlement." [Source: *Wall Street Journal*, August 11, 1989]

In testimony last year to the House Judiciary Committee, Mr. John Graham of the American Society of Association Executives and the National Coalition for Volunteer Protection pointed out that the Gallup Organization had found in 1988 that about one of every ten nonprofit organizations had had a volunteer resign because of concerns about legal liability, and that one of every six volunteers said that they had withheld their volunteer services because they feared lawsuits.

COST

When this *Legislative Notice* was printed, the Congressional Budget Office had not prepared a cost estimate. Because S. 543 has not been reported from a committee, it is possible that no estimate will be forthcoming.

ADMINISTRATION POSITION

When this *Legislative Notice* was printed, no official Statement of Administration Policy had been received.

In his radio address of April 5, 1997, President Clinton said, "The era of big government may be over, but the era of big challenges for our nation is surely not. Citizen service is the main way we recognize that we are responsible for one another. It is the very American idea that we meet our challenges not through heavy-handed government or as isolated individuals, but as members of a true community, with all of us working together."

OTHER VIEWS

At the House hearings on April 23, numerous witnesses testified in support of protecting volunteers. Andrew Popper, Professor of Law at American University, was the only witness to testify against the House bills, and Congressman John Conyers, Ranking Minority Member on the House Judiciary Committee, expressed strong disagreement with the House bills.

POSSIBLE AMENDMENTS

No list of possible amendments was available at press time. The question of amendments is, of course, closely tied to continuing negotiations on the bill.

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